Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

BRIEF FOR RESPONDENT CORVALLIS SAND AND GRAVEL COMPANY IN OPPOSITION

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Respondent.

BRIEF FOR RESPONDENT CORVALLIS SAND AND GRAVEL COMPANY IN OPPOSITION

Respondent, Corvallis Sand and Gravel Company, opposing the issuance of a Writ of Certiorari, prays for denial of the Petition.

Petitioner's citations to Opinions Below, Statutes Involved, and Appendices are accurate and adequate when read in conjunction with Respondent's previous Petition For a Writ of Certiorari to the Supreme Court of the State of Oregon, No. 75-577, which Petition and all Appendices are hereby incorporated by this reference.

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court summarily dismiss the State's Petition for Writ of Certiorari when it was not timely filed within 90 days of the last Oregon Supreme Court action relative to the question raised for review?

2. Is the affirmation by the Oregon Supreme Court of the trial court's finding that the change of channel in the Willamette river was avulsive contrary to the decision of this court in Bonelli Cattle Co. v. Arizona?

JURISDICTION

Respondent denies that this Court possesses jurisdiction to hear and review petitioner's claim inasmuch as petitioner failed to file its petition within 90 days of the date of the last act of the Oregon Supreme Court relative to the question now presented. For purposes of brevity and simplification, respondent sets forth the factual basis and contentions relative to this assertion under its first reason for denying the writ, infra.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of Oregon, Amended Article VII, Section 3:

> "JURY TRIAL; RE-EXAMINATION OF ISSUES BY APPELLATE COURT; RECORD ON APPEAL TO SUPREME COURT; AFFIRMANCE NOT WITHSTANDING ERROR; DETERMINATION OF CASE BY SUPREME COURT. In actions at law, where the value in controversy shall

> exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict ***."

Constitution of Oregon, Article I, Section 18:

> "PRIVATE PROPERTY OR SERVICES TAKEN FOR PUBLIC USE. Private property shall not be taken for public use, nor the particular services of any men be demanded, without just compensation; ***."

Constitution of United States, Amendment XIV, Section 1:

> "*** nor shall any state deprive any person of life, liberty, or property, without due process of law ***."

Constitution of United States, Amendment V:

> "No person shall***be deprived of life, liberty, or property, without due process of law;".

STATEMENT OF THE CASE

Respondent relies upon its Petition for Writ of Certiorari filed heretofore. In addition, it calls the following facts to this Court's attention:

1. Facts Concerning Lack of Jurisdiction Occasioned by Untimely Filing

Petitioner State of Oregon computes the 90-day period allowed under 28 U.S.C. § 2101(c) as commencing with the denial by the Oregon Supreme Court of respondent Corvallis Sand and Gravel Company's Motion to Withdraw or Suspend Clarification of Opinion set forth in petitioner's Appendix C (Pet. 2) This motion in no way related to the issue of what constitutes an avulsive change, the basis of the petition of the State of Oregon. The motion dealt with the location of the downstream end of the avulsive channel. (A. 19)

2. Facts Concerning the Avulsive Alteration of the Channel

Respondent Corvallis Sand and Gravel Company is the record owner of the disputed land under the new channel of the Willamette River.

Respondent and its predecessors in title were at all times riparian owners of the disputed property upstream from the area where the river broke through in 1909, and were record title holders of the land over which the river flows in the avulsive channel established in 1909.

Petitioner acknowledges that the 1909 flood was one of the "extraordinary floods" which occurred in this area (Pet. 5). Petitioner also acknowledges:

> "In the Corvallis area banks under 20 feet were covered by high water whereas during extreme high water the whole valley was overflowed." (Pet.5)

Petitioner further concedes that the trial judge found that the change of channel in 1909:

> "*** was not gradual and perceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion." (Pet. 9)

Petitioner requests this Court to overturn that factual finding. While the action was one at law, the parties stipulated that it should be tried to the court sitting without a jury. The trial judge, as the trier of facts, made the quoted finding.

REASONS FOR DENYING THE WRIT

1. THE PETITION FOR WRIT OF CERTIORARI OF THE STATE OF OREGON WAS NOT TIMELY FILED AND SHOULD BE DISMISSED.

This Court stated the pertinent rule:

> "Thus, while we do not mean to encourage application for piecemeal review by today's decision, we do mean to encourage applicants to this court to take heed of another principle -- the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. These statutes are not to be applied so as to permit a tolling of their time limitations because some

event occurred in the lower court after judgment was rendered which is of no import to the matter to be dealt with on review."

> Federal Trade Commission v. Minneapolis-Honeywell R. Company, 344 U.S. 206, 97 L.Ed. 245, 252, 73 S.Ct. 245 (1952)

See also Class v. Norton, 505 F.2d 123, 125 (2d Cir. 1974) and Cornish v. Richland Parish, 479 F.2d 37, 39 (5th Cir. 1973).

At no time after June 12, 1975 (the date of the decision of the Supreme Court of the State of Oregon), did petitioner seek to perpetuate its contention that the change in the channel of the Willamette River was not avulsive and that the state of Oregon owned the land underlying the present channel. While it filed a Petition for Rehearing, this petition contended only that the location of the channel had been erroneously determined. Petitioner does not rely on its Petition for Rehearing; instead it relies on a motion filed by the respondent which in no way related to the issue here presented.

Under these facts, the 90-day period commenced June 12, 1975, and was not tolled by any subsequent petition or motion; the 90 days expired September 10, 1975 and petitioner's petition, filed on October 14, 1975, fails to comply with 28 U.S.C. § 2101(c).

2. BECAUSE THE CHANGE OF CHANNEL OF THE

WILLAMETTE RIVER WAS AVULSIVE AS A MATTER OF FEDERAL LAW, AND BECAUSE THE CASE OF BONELLI CATTLE CO. v. ARIZONA, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517, DID NOT INVOLVE THE ISSUE OF NATURAL AVULSIVE CHANGES, THE DECISION OF THE OREGON SUPREME COURT IS NOT CONTRARY TO BONELLI.

A. Petitioner contends that the decision of the Supreme Court of the State of Oregon is contrary to Bonelli, supra. The stated basis of conflict is that Bonelli, supra, declared that:

> "In order for the States to guarantee full public enjoyment of their navigable water courses, it has been held that their title to the bed of a navigable stream mechanically follows the river's gradual changes in course." Bonelli 414 U.S. at 318 (Pet. 11)

The context of the quote is a discussion of classic accretion where a river moves gradually through the process of erosion. As such it is irrelevant to the facts in this case wherein the main channel of a river cut across the neck of a peninsula and occupied a new channel leaving a substantial quantity of land intervening between the former channel and the new channel (Pet. 20, Fig. 3). This is a classic avulsion. Bonelli, supra, did involve an avulsive change, but the change was brought about artificially by the Corps which narrowed the channel of the river.

Bonelli, supra, did not involve an

abandonment of an existing channel which is the problem here presented. The facts being entirely different, there is no conflict and no basis for jurisdiction in this Court.

B. The Constitution of Oregon provides in part as follows:

AMENDED ARTICLE VII:

"SECTION 3. JURY TRIAL; RE-EXAMINATION OF ISSUES BY APPELLATE COURT; RECORD ON APPEAL TO SUPREME COURT; AFFIRMANCE NOT WITHSTANDING ERROR; DETERMINATION OF CASE BY SUPREME COURT. In actions at law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict ***." (Emphasis supplied.)

The Oregon appellate courts found there was evidence to support the finding and left it undisturbed (Pet. 10). On this state of the record and law the finding is binding and forecloses the granting of the petition.

C. Petitioner urges that despite the finding, the change was not avulsive as a matter of law because the river did not flow exclusively in the new channel immediately after the 1909 flood. (Fig. 3, Pet. 20, shows that by the time of the USGS survey of 1911-13 almost all of the river flowed in the new channel.) Petitioner further

contends that the change is not avulsive because there was water flowing in the new channel commencing in about 1890 when the river was four to five feet above normal water. Petitioner did not include in its facts the testimony of Fred Fischer, its witness, that water flowed in the "gully" (the new channel) "only during the rainy season". (Tr. 392) Nor did the petitioner point out that the 1890 Corps survey by Clapp described the new channel as a "hi-water chute". (Ex. 62) The "gully" became the new channel of the river in 1909 during a major flood.

The principle that an avulsive change of channel works no change in the ownership of the underlying fee is as ancient as the Roman law. See historical discussion Missouri v. Nebraska, 196 U.S. 23, 25 S.Ct. 155, 49 L. Ed. 372 (1904).

The following authorities support the ruling of the Oregon appellate courts that even though a change in channel may take place over a period of years it is nevertheless avulsive: 65 CJS 271, Navigable Waters, § 86; Farnham, Waters and Water Rights, § 847; p. 2492; Missouri v. Nebraska, supra, Washington v. Oregon, 211 U.S. 127, 53 L.Ed. 119, 136, ___ S.Ct. ___ (1908); Commissioners v. United States, 270 Fed. 110 (8th Cir. 1920); Anderson-Tully Co. v. Franklin, D.C. (N.D.-Miss. 1960), 307 F. Supp 539; Durfee v. Keiffer, (Neb.) 95 NW2d 618 (1959).

The rule is stated as follows:

"However, when a navigable stream

changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, title to riparian lands, which may have become islands, remains unaffected, notwithstanding the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of the waters passing through the old channel until finally the new channel became the main channel of navigation."

65 CJS 271, Navigable Waters, § 86

Commissioners v. United States, supra, represents a leading authority. Although the change from the old to the new channel there extended over approximately 50 years, the Eighth Circuit applied the principle that the change was avulsive.

Commissioners, supra, cited Washington v. Oregon, supra, a proceeding in which the State of Washington brought a suit in equity to settle the boundary dispute between the states in the area of the mouth of the Columbia River. Historically, two channels, the north channel and the south channel, existed

at this location. Upon admission of Oregon to the Union, the north channel was designated as its north boundary. When Washington was admitted, the same channel was designated as its south boundary. Over a period of many years the north channel filled in and the south channel became the channel of navigation. Washington contended that this change brought about a change of boundary enlarging the area of that state. The Supreme Court rejected the contention, 53 L.Ed. at 136:

> "These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river."

Durfee v. Keiffer, supra, cited Commissioners, supra, with approval, and followed it.

In Anderson-Tully, supra, the court observed, at 541-52:

> "3) "Avulsion is a change in a boundary stream so rapidly or so suddenly

made, or in such a short time, that the change is distinctly perceptible or measurably visible at the time of its progress. Or to state it otherwise, so far as concerns practical purposes, when the change is not by accretion, it is by avulsion." Sharp v. Learned, 1943, 195 Miss. 201, 14 So.2d 218, 220. In Missouri v. Nebraska, 1904, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed.372, 375, the Supreme Court of the United States said: "In the latter case, the court, after referring to the rule announced in New Orleans v. United States [10 Pet. 662, 9 L.Ed. 573], and citing prior cases in which that rule has been recognized, said: 'It is equally well settled that where a stream which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould, Waters, § 159, it is said: "But if the change is violent and visible and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates"'". (Emphasis supplied.)

In the present case, the change did not result from a gradual and imperceptible movement of the bed; instead, it occurred during a major flood which established a new channel, leaving land intervening between the old channel and the new. As such it could not be an accretion. Anderson-Tully, supra. Being an avulsion there is no change of ownership underlying the bed of the new channel: Mr. Digges' arguments (1568-9), History and Law of the Foreshore and Seashore, (3d Ed., Moore & Hall, published by Sweet & Maxwell, London, 1888); Sir Matthew Hale "DeJureMaris", History and Law of the Foreshore and Seashore, (3d Ed.) page 371; Bonelli, supra, 38 L.Ed.2d at 539.

The rule of retention of title because of the avulsive encroachment of a new channel has its origins in antiquity and rests upon good sense. Why should a man lose title to his land because a river now flows over it? If the land contains valuable deposits of mineral or oil, should he be denied the benefits of those deposits because of the presence of the water? Should the state take title to land which it does not require for the purpose of protecting the public interests of navigation and fishery? (The bed is subject to the navigational servitude even though it is privately owned. Bonelli, supra, 38 L.Ed.2d at 542.) The answer to each of these inquiries is clearly "no".

The state would enlarge that servitude into a fee title, something unknown to the law, wholly unprecedented and completely unjustifiable.

There is yet another reason why the state does not acquire title to the privately owned land underlying the new bed. To grant it title would be to take property in violation of due process and without compensation, both of which are forbidden by the Constitution of Oregon and by the Constitution of the United States. Article I, Section 18, Constitution of Oregon; Amendment XIV, Section 1, and Amendment V, Constitution of United States, supra. This Court in Bonelli, supra (38 L. Ed.2d at 541), expressed concern over the taking of property by judicial decree.

The unstated, but real, objective of petitioner is to acquire title to the sand and gravel materials in the bed of the new channel, not for the purpose of protecting the public rights of navigation and fishery, but to enable it to engage in the business of selling those materials. This Court has already ruled that the state does not own those materials. Bonelli, supra (38 L.Ed.2d at 536).

CONCLUSION

The petition should be dismissed because it was not filed within 90 days of the date the Oregon Supreme Court last ruled on the issue of whether the change of channel was by avulsion or by accretion.

If the petitioner's proposition that the state owns where the river has been, where it is now and wherever it flows in the future is approved, the result will be endless litigation, not alone as to the Willamette River

which historically has traversed large sections of the Willamette Valley, but also all other dynamic rivers. Much of the property is dry land. The dispute will be endless. All the while, no aspect of the public interest of navigation and fishery will be served thereby.

The state should be limited, at most, to the present location of the river to the extent that it can establish that no avulsive change has taken place which resulted in the river flowing over property which is privately owned.

The seeking by the state of additional sources of sand and gravel and real estate for the purpose of profitable enterprise is abhorrent to the established concepts that the state cannot take property without compensation and that the state's proper and limited interest is to protect the public rights of navigation, fishery and similar uses.

Petitioner's position is also contrary to Bonelli, supra, which declared that the state can only claim title to that property which is necessary for the protection of navigation. The fee being determinable, excess land vests in the riparian owner.

Petitioner seeks to invoke the jurisdiction of this Court by contending that the decision of the Supreme Court of the State of Oregon is contrary to Bonelli, supra. Bonelli, supra, did not deal with the establishment of an entirely new channel by forces of nature

unleashed during a great flood; nor did Bonelli, supra, hold that where a river flows over private land the state acquires ownership of the land. There being no conflict, there exists no basis for review by this Court. In fact, there can be no conflict between the present decision of the Supreme Court of the State of Oregon and Bonelli, supra, because the decision of the Oregon court conformed to the established federal law of avulsion.

Petitioner contends that the law grants to it ownership of the land underlying the new bed. It cites no authority for such a proposition. None exists.

This Court should deny the petition.

Respectfully submitted,

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October 1975

APPENDIX A

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff-Appellant and Cross-Respondent, vs CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant-Respondent and Cross-Appellant.	MOTION TO WITHDRAW OR SUSPEND CLARIFICATION OF OPINION Benton County 21512

Defendant shows the following to the court:

1. Plaintiff, at the trial of the 1958 quiet title suit, entered into evidence a map prepared by it (Ex. 260 herein) which established the downstream end of Fischer Cut as being located at the confluence of the now main channel of the Willamette river and East river.

2. At all times subsequent to the filing of its original Complaint herein in 1965, and throughout the trial of this case and during the period of its appeal in the court of appeals the plaintiff continued to maintain that the said confluence represented the downstream end of Fischer Cut. Plaintiff, on or about February 28, 1975, for the first time,

changed its position to contend that Fischer Cut extends downstream from said confluence.

3. Defendant at all times relied upon the position of the plaintiff as to the location of the downstream end of Fischer Cut as being the said confluence.

4. Based on this reliance, the defendant admitted in its pleading that it claimed no interest in the portion of the river designated as Parcel 3 or any portion of the bed downstream from Parcel 3.

5. To bind the defendant to the admissions in its pleadings of non-ownership of the portion of the bed below the said confluence will work a great hardship upon the defendant in that it will be deprived of valuable property.

6. The defendant has never had an opportunity to explain the reason for its inadvertent admissions that the plaintiff owned the bed of the river below said confluence.

7. The law provides that parties litigant are to be relieved from the admissions set forth in their pleadings where there is no gross negligence on the part of the pleader. 71 CJS 154, Pleading, Section 59 (f) citing Bunting Tractor Company, Inc. vs Roy L. Houch Sons' Corporation, 253 Or 517, 454 P2d 651 (1969).

Defendant moves the court for an order as follows:

1. Permitting the defendant to withdraw the admissions contained in its pleading which serve as the basis for the clarification of the original opinion herein.

2. Withdrawing the clarification of the former opinion herein.

3. In the alternative, authorizing the defendant within twenty (20) days to present evidence to the court in the form of a brief establishing that it was misled by the plaintiff and that the defendant had reasonable grounds for relying on the plaintiff's position that the confluence of the present main channel and East river represented the downstream limit of Fischer Cut.

/s/ ROBERT MIX
Attorney for defendant-respondent and cross-appellant

I hereby certify that I served the foregoing Brief for Respondent Corvallis Sand and Gravel Company in Opposition on Peter Herman, of attorneys for petitioner on the day of November, 1975, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at Department of Justice, 103 State Office Building, Salem, Oregon 97310, which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at Corvallis, Oregon, on the day last above mentioned, with the postage thereon fully paid.

_____

Robert Mix
Attorney for Respondent